

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWIN BRENT PHILLIPS,

Defendant-Appellant.

UNPUBLISHED

July 28, 2000

No. 220084

Kent Circuit Court

LC No. 98-002864-FC

Before: McDonald, P.J., and Neff and Zahra, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(f); MSA 28.788(2)(1)(f) (the actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration), and sentenced to ten to fifty years' imprisonment. He appeals as of right. We affirm.

I

Defendant first argues that the trial court erred by denying his motion in limine to bar the testimony of prior stalking-type incidents between the victim and defendant. A decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of that discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

The trial court denied defendant's motion in limine and ruled the proposed evidence admissible, indicating that defendant's constant calling to check on the victim's activities at work can be interpreted as "stalking," suggestive of a deteriorating relationship, which defendant refused to accept. Defendant's refusal to accept "no" in one context suggested also an inability to accept the victim's refusal in another context, thus making consensual sex less likely. The trial court did not abuse its discretion by denying defendant's motion in limine.

II

Defendant, an African-American, next contends that the prosecutor's peremptory exclusion of three African-Americans from the jury venire denied him a fair trial. US Const, Am XIV; *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). We disagree. In *People v Howard*, 226 Mich App 528, 534; 575 NW2d 16 (1997), this Court addressed the procedure to be followed in adjudicating a *Batson* challenge as follows:

To overcome a prima facie showing of discriminatory purpose, the prosecution must come forth with a racially neutral explanation for challenging African-American jurors. *Batson, supra* at 97. Mere statements of good faith or denial of a discriminatory motive are insufficient; rather, the prosecutor must articulate a neutral explanation related to the particular case being tried. *Id.* at 98. The trial court must then determine if the defendant has established purposeful discrimination. *Id.* This Court reviews a trial court's *Batson* ruling for an abuse of discretion. [Citation omitted.]

See also *People v Ho*, 231 Mich App 178, 184; 585 NW2d 357 (1998).

During jury voir dire, the prosecutor peremptorily excused three African-American venirepersons, leaving a jury comprised exclusively of white persons. Defense counsel initially expressed his satisfaction with the jury as constituted, but shortly thereafter objected to the exclusion of the three African-Americans, citing *Batson, supra*. The prosecutor explained that she excluded two of these individuals because "both had close relatives who have been prosecuted by my office and are still awaiting sentence under drug charges," pointing out that she had peremptorily excused a white venireperson on that same basis. Regarding the third individual excused, the prosecutor stated that she had previously prosecuted a sexual assault case involving that person's daughter, and had worked closely with the person in the case, although during voir dire, the person did not acknowledge the connection.

The trial court determined that, even had defendant's objection been timely, the challenges would have been allowed because the prosecutor's reasons for excusing the venirepersons were adequate. We agree with the trial court that the reasons the prosecutor advanced in support of her peremptory excusal of the three venirepersons are race-neutral and were honestly held. *Batson, supra* at 476 US 97. The trial court did not abuse its discretion in rejecting defendant's claim of purposeful discrimination.

III

Defendant also maintains that some of the trial court's preliminary jury instructions were confusing and deprived him of a fair trial. Defendant failed to object to the challenged instructions at trial. Because the unchallenged instructions did not result in fundamental injustice to defendant, *People v Townes*, 391 Mich 578, 586; 218 NW2d 136 (1974); *People v Vicuna*, 141 Mich App 486, 494; 367 NW2d 887 (1985), and do not constitute plain error affecting his substantial rights, *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999), appellate relief is not warranted.

IV

Defendant next claims that the trial court improperly permitted the victim to testify regarding the facts and circumstances involved in her prior conviction for creating a disturbance. A decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *Starr, supra*.

Defendant presents no authority substantiating his contention that this procedure was improper and inflamed the jury's passions against him. Existing case law supports the trial court's position that a witness who admits to the prior conviction of a crime should be permitted to offer the jury an explanation regarding it. *Perin v Peuler*, 373 Mich 531, 545; 130 NW2d 4 (1964), overruled on other grounds *McDougall v Schanz*, 461 Mich 15, 32; 597 NW2d 148 (1999); *Socony Vacuum Oil Co v Marvin*, 313 Mich 528, 537; 21 NW2d 841 (1946). The trial court did not abuse its discretion by permitting the victim to explain the circumstances surrounding her prior conviction.

V

Defendant further claims that the trial court abused its discretion by prohibiting George Martin, the victim's ex-husband, from testifying that when he was married to the victim, she once accused him of raping her. We disagree. Martin testified on a separate record and admitted that the victim made the allegation during an argument and had not made the allegation to the police. The trial court ruled that the rape-shield statute, MCL 750.520j; MSA 28.788(10), as interpreted in *People v Hackett*, 421 Mich 338, 346-349; 365 NW2d 120 (1984), prohibited the introduction of the proposed testimony and that, in order to be admissible, the past false accusations of rape must have been made to a third party, and not merely in an argument between a married couple. We conclude that the trial court properly exercised its discretion in barring the proposed testimony of George Martin.

VI

Defendant also argues that, during closing argument, the prosecutor improperly stated that after the DNA analysis showed the presence of defendant's semen in the victim following her assault, defendant changed his defense, from contending that he had not seen the victim on the night in question, to claiming that, although he had had sexual relations with the victim on that night, it was consensual. Prosecutorial misconduct issues are decided on a case-by-case basis, and this Court must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context to determine whether they denied the defendant a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

Although the prosecutor's remarks are suspect in light of the fact that, on April 15, 1998, defense counsel moved to admit evidence at trial regarding the victim's past sexual conduct with defendant, and claimed in his brief supporting this motion that "[i]t will be [defendant's] defense that [the victim] and he entered into a consensual sexual relationship on the night of this alleged incident," the prosecutorial comment did not deny defendant a fair trial pursuant to the *Bahoda/Noble* standard, nor has he successfully discharged his burden of establishing a miscarriage of justice under the "more

probable than not” standard enunciated in *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Reversal is therefore unwarranted.

VII

As his final allegation of error, defendant claims that his sentence of ten to fifty years’ imprisonment is disproportionate to the offense and the offender and violates the federal constitutional protection against cruel and unusual punishment. We disagree. Provided that permissible factors are considered, appellate review of a defendant’s sentence is limited to whether the sentencing court abused its discretion. *People v Coles*, 417 Mich 523, 550; 339 NW2d 440 (1983), overruled in part on other grounds *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990); *People v Fetterley*, 229 Mich App 511, 525; 583 NW2d 199 (1998). A sentencing court abuses its discretion when it violates the principle of proportionality. A sentence must be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Paquette*, 214 Mich App 336, 344-345; 543 NW2d 342 (1995).

Defendant’s minimum sentence of ten years falls within the sentencing guidelines range of eight to fifteen years. Sentences falling within the guidelines range are presumed to be neither excessively severe nor unfairly disparate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Defendant has not produced any compelling evidence demonstrating that his sentence violates the principle of proportionality. The crime of which he was convicted is heinous, involving not only forcible sexual intercourse with the victim, but also a violent beating. Furthermore, although the trial court did not articulate on the record any grounds for the sentence imposed, it did state that it was “looking to the guidelines,” which is sufficient to satisfy the articulation requirement of *Coles*, *supra* at 549-550. *Broden*, *supra* at 355. There was no abuse of discretion.

Affirmed.

/s/ Gary R. McDonald

/s/ Janet T. Neff

/s/ Brian K. Zahra